IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 24, 2006 Session

# KEVIN TAYLOR v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County**
**No. 95-C-1907 Seth Norman, Judge**

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**No. M2005-02897-CCA-R3-CO - Filed December 18, 2006**

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The Petitioner, Kevin Taylor, filed a petition for writ of error coram nobis alleging that newly discovered evidence mandated a new trial. The Davidson County Criminal Court denied relief concluding, among other things, that the witness who testified in support of the petition was not credible. Upon a review of the record in this case, we conclude the Petitioner was not "without fault" in failing to present this witness at the "proper time" and, additionally, affirm the judgment based upon the trial court's determination that the witness was not credible. The judgment is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

Wendy Tucker, Nashville, Tennessee, for the appellant, Kevin Taylor.

Paul G. Summers, Attorney General and Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

This is the Petitioner's fourth time before this Court since he was convicted of felony murder and attempted especially aggravated robbery in 1996. For these convictions, he received concurrent sentences of life and ten years respectively. The procedural history in this case has been succinctly set out by this Court in three prior decisions. See State v. Kevin Taylor, No. 01C01-9707-CR-00263, 1998 WL 849324 (Tenn. Crim. App., Nashville, Dec. 9, 1998) (direct appeal), perm. to appeal denied, (Tenn. May 10, 1999); Kevin Taylor v. State, No. M2000-01414-CCA-R3-PC, 2001 WL

935333 (Tenn. Crim. App., Nashville, Aug. 17, 2001) (post-conviction proceeding); Kevin Taylor v. State, No. M2003-02982-CCA-R3-CO, 2004 WL 2984857 (Tenn. Crim. App., Nashville, Dec. 13, 2004) (first coram nobis proceeding).

The facts underlying these convictions are as follows:

> On December 26, 1994, the 20-year old victim, Joshua Sabine, drove to Nashville with James DeMoss, Rex Clayton and 15-year old Brian Binkley. The victim was driving, and Binkley was in the front passenger seat. DeMoss and Clayton were in the rear seat. The victim intended to purchase some wheel rims in Nashville.
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> The victim drove near a housing project in West Nashville where Cordell Sykes, the co-defendant, asked the victim if he had come for the rims. Sykes requested that they come back in approximately 30 minutes.
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> Upon their return Sykes approached the driver's door and advised the victim that he was unable to get the wheel rims. The [Petitioner] approached the passenger door and endeavored to sell drugs to the car occupants. Binkley advised him they were not interested in purchasing drugs, and the [Petitioner] walked around to the driver's door. Sykes then reached into the vehicle to place the gear shift in "park" and struggled with the victim. At that time another person began shooting into the vehicle. Binkley testified that both of Sykes' hands were inside the vehicle at the time of the shooting, and Sykes did not have a weapon.
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> Regina Tyson and Tara Williams were together at the scene at the time of the shooting. Tyson testified she observed the [Petitioner] and Corey Gooch walk by her. The [Petitioner] took Gooch's baseball cap, placed it upon his head and lowered it just above his eyebrows. The [Petitioner] also slid a gun into his black leather jacket and stated he was "going to show them how to do a jack move." She explained that "jack move" means robbing someone.
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> Tyson further testified that both Sykes and the [Petitioner] were at the Blazer when she heard gunshots. She then observed Sykes flee while the [Petitioner] simply walked across the street, got in his car and drove away. The only person she saw with a gun that night was the [Petitioner].
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> Corey Gooch testified that he was with the [Petitioner] on the night in question. He observed the [Petitioner] at the vehicle and saw Sykes on the driver's side struggling with the driver. He also observed the [Petitioner] at the vehicle when he heard the shots but was unable to determine who actually fired the shots. Gooch saw the [Petitioner] later that evening, and the [Petitioner] stated there was a radio

> in the vehicle but things "didn't work out." Gooch assumed the [Petitioner] was trying to get the radio.
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> The victim was shot in the hail of gunfire. Binkley grabbed the steering wheel, pushed the accelerator and sped from the scene. The parties drove to a convenience store and called 9-1-1. The victim subsequently died from the gunshot wounds.
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> The forensic pathologist testified that the victim had three gunshot wounds; namely, one to the left part of the back, one to the back of the left hand and one to the upper left arm. Since the back wound had "stippling," that shot was fired from a distance of less than three feet.
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> The [Petitioner] was arrested several months after the incident. In his initial statement to the police, he stated he was across the street when the shooting began. After further interrogation, he admitted approaching the passenger side trying to sell drugs and then going around to the driver's side where he stood beside Sykes. He told the officers that Sykes was the person who shot the victim. The [Petitioner] denied to the officers that he was wearing a black leather jacket. This was contrary to the trial testimony of Binkley, Tyson and Gooch.
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> The defense offered no evidence at trial.

Taylor, 1998 WL 849324, at *1-2.

On direct appeal, this Court affirmed the Petitioner's convictions and resulting sentence. Id. at *8. In evaluating the sufficiency of the evidence to support the Petitioner's convictions, this Court reasoned as follows:

> The state's proof revealed that the [Petitioner] placed a gun in his jacket and stated his intention to commit a robbery. He was then seen standing beside Sykes at the driver's door. The passenger in the front seat testified that at the time of the shooting Sykes' hands were in the vehicle, and Sykes did not possess a weapon.

Id. at *3.

Thereafter, the Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel and the deprivation of his right to due process. Taylor, 2001 WL 935333, at *1. This Court concluded that the Petitioner's ineffective assistance allegations did not merit relief and affirmed the judgment of the post-conviction court.

As one of his assertions of ineffective assistance of counsel, the Petitioner averred that trial "counsel provided ineffective assistance by not interviewing and/or calling as witnesses Rex Allen Clayton and James DeMoss." Id. at * 4. In finding this allegation to be without merit, this Court reasoned as follows:

> The above recitation of the facts recounts that these individuals along with Brian Binkley were passengers on the night in question in a vehicle driven by the victim. Binkley occupied the front seat while Clayton and DeMoss rode in the back seat. Through Clayton and DeMoss the [P]etitioner hoped to obtain conflicting testimony from that of Binkley, a key prosecution witness.
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> When asked about his decision not to search for and interview Clayton and DeMoss, trial counsel set out numerous reasons for his inaction. For example, according to the statements which these men had given to the police, they had been unable to see what had transpired.[1] Furthermore, these were witnesses that the prosecution had listed among its own; however, the State had not been able to find them for trial.[2] Trial counsel indicated his concern that if he had located them, the men's testimony would likely have proven more beneficial to the State. He reasoned that the two probably would not have been kindly disposed toward his client. Additionally, even if Clayton and DeMoss had not seen anything, counsel expected that their testimony would include mention of the terror in which they had been placed. Subsequently counsel observed that without these risks he had been able to put before the jury, through Detective Pat Postiglione, the fact that neither Clayton nor DeMoss had been able to identify the [P]etitioner. Moreover, trial counsel related that he had Binkley on record from a previous hearing testifying that he could not identify the [P]etitioner as the shooter; thus, counsel did not feel a pressing need to attack Binkely's credibility through potentially damaging witnesses such as Clayton and DeMoss.
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> Also testifying on this issue was the [P]etitioner, who stated his belief that these witnesses "[p]ossibly could have supported a defense." However, he did not claim to know what their purported testimony would have been beyond a vague hope for inconsistencies with Binkley's version of the event. Furthermore, he called neither Clayton nor DeMoss as witnesses at this post-conviction hearing and offered no testimony concerning any attempts to do so. Over a decade ago this Court stated: "When a petitioner contends that trial counsel failed to discover, interview, or present

[1]There was some indication that the windows of the victim's vehicle were tinted, which would have made it difficult for Clayton and DeMoss to see anything from the back of the vehicle.

[2]Apparently the State earnestly sought to locate these two individuals prior to trial to no avail, and the Petitioner offers no proof that trial counsel could have found Clayton and DeMoss when the prosecution could not.

> witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." State v. Black, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).
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> Thus, without needing to address the deficient performance prong, we determine that the [P]etitioner has once more failed to meet his burden of proof. He has not shown that the outcome of his case would have been changed had counsel interviewed these witnesses or called them to testify at trial. We, therefore, see no basis for relief arising from this contention.

Taylor, 2001 WL 935333, at *4 -5. No permission to appeal was filed.

On September 26, 2003, the Petitioner filed a pro se petition for writ of error coram nobis, arguing that newly discovered evidence merited a new trial. The trial court summarily dismissed the petition and, on appeal, this Court reversed and remanded for an evidentiary hearing. Taylor, 2004 WL 2984857, at *3.

A hearing was held on October 7, 2005. At the hearing, the trial court heard testimony from James DeMoss. DeMoss testified that, at the time of the shooting and for the next "four or five years," he lived with his parents at 103 B Olive Street in Dickson. According to DeMoss, he and the victim had been friends since they were six years old and were like "brothers." DeMoss confirmed that he was present in the vehicle at the time of the shooting—in the back seat on the driver's side—and that he gave an audiotaped statement to police following the murder. In this statement,[3] DeMoss admitted that he had poor eyesight, especially at night, and stated that he could only identify the man who reached inside the vehicle, that he could not say for certain whether the coat this individual was wearing was brown or orange, and that he could not see the individual outside of the vehicle.

DeMoss testified that he did not know the Petitioner in December 1994 and that he only became acquainted with him in 2002, when the two met in prison. During an ensuing conversation, the Petitioner recognized DeMoss' name because he was listed as a witness on the Petitioner's indictment. DeMoss testified that, after meeting the Petitioner, he realized that the Petitioner was not the gunman. At the hearing, DeMoss described the shooter as a "tall dude." DeMoss admitted that the vehicle's windows were tinted but said that "there was a light behind the person[.]" He stated that the shooter was "probably about 6'1", or 6'2" . . . [a]bout 160, 165 to 170, somewhere around in there." He also testified that the shooter had a "slim face." DeMoss then testified that the Petitioner did not match this description and he was convinced that the Petitioner was not "the person who did the shooting." DeMoss stated that, had he been interviewed prior to trial, he would have provided the same physical description of the shooter and told the police that the Petitioner was not the gunman.

[3] The audiotape was entered as an exhibit in the coram nobis hearing.

On cross-examination, DeMoss admitted that he was serving time for burglary and murder and had additional convictions for theft and forgery. DeMoss also admitted that he met with the police on more than one occasion. DeMoss further testified that "whenever we pulled up there was somebody over on the pay phone" and that the Petitioner told him he was the individual on the phone.

Detective Postiglione testified on behalf of the State. The detective stated that DeMoss was able to identify Sykes from a photographic array but that DeMoss was not shown photos of the Petitioner because of his previous statement that he could not identify the shooter.

In denying the writ of error coram nobis petition, the trial court stated as follows:

> The first issue to be determined in this matter deals with the credibility of Mr. DeMoss. . . .
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> . . . .
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> It seems doubtful that Mr. DeMoss's recollection of the events that took place over ten years ago would suddenly now be clearer and more detailed than they were just shortly after the incident. His record of dishonest criminal activity only furthers the suspect nature of his testimony. The Court believes that the veracity of Mr. DeMoss is questionable at best and as a result, it would therefore be imprudent to deem his testimony reliable.
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> The second factor to be determined by this Court is the effect that his testimony, had it been presented at trial, would have had on the jury. Having previously called into question Mr. DeMoss's credibility, it does not seem as though his testimony would have had much influence on a jury in its determination of the [P]etitioner's culpability. . . .
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> The final factor to be examined by the Court is whether the [P]etitioner was at fault for failing to present this evidence at trial. It is difficult to fault the [P]etitioner for not introducing the testimony of Mr. DeMoss at trial due to the fact that Mr. DeMoss did not seem at all certain of the events as they occurred on the night of the murder. The previous interviews did not indicate that Mr. DeMoss would have provided any substantive proof, so it is unlikely that the recently produced testimony could have been discovered at the time of trial.
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> In the aforementioned post-conviction opinion, the Court of Criminal Appeals concluded that trial counsel was not at fault for failing to call Mr. DeMoss partially because he was unable to be found at the time of trial and because of the damaging effect that his testimony might have had on a jury. Taking these factors into consideration, the Court does not believe that the [P]etitioner can be faulted for

> failing to produce the witness at trial. However, the Court nevertheless believes that the Petitioner here may not be entitled to relief by way of the present Petition for Writ of Error Coram Nobis.

It is from this determination that the Petitioner now appeals.

## ANALYSIS

The Petitioner argues that DeMoss' testimony amounts to newly discovered evidence which entitles him to a new trial. Relief by petition for writ of error coram nobis is provided for in Tennessee Code Annotated section 40-26-105. This statute provides, in pertinent part:

> The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

Tenn. Code Ann. § 40-26-105.[4]

A writ of error coram nobis is an "extraordinary procedural remedy." State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999). The decision to grant or deny a petition for writ of error coram nobis on the ground of subsequently or newly discovered evidence rests within the sound discretion of the trial court. Tenn. Code Ann. § 40-26-105; Teague v. State, 772 S.W.2d 915, 921 (Tenn. Crim. App. 1988), overruled on other grounds by Owens v. State, 908 S.W.2d 923, 928 (Tenn. 1995); Jones v.

[4]The statute of limitations for seeking a writ of error coram nobis is one year from the date the judgment becomes final in the trial court. Tenn. Code Ann. §§ 27-7-103, 40-26-105; State v. Mixon, 983 S.W.2d 661, 671 (Tenn. 1999). A judgment becomes final, for purposes of coram nobis relief, thirty days after the entry of the judgment in the trial court if no post-trial motion is filed. Mixon, 983 S.W.2d at 670. If a post-trial motion is timely filed, the judgment becomes final upon entry of the order disposing of the post-trial motion. Id. In this case, the Petitioner was convicted by a jury in 1996. However, "the statute of limitations [applicable to writs of error coram nobis] is an affirmative defense which must be specifically plead or is deemed waived." Newsome v. State, 995 S.W.2d 129, 133 n.5 (Tenn. Crim. App. 1998). "Although coram nobis claims also are governed by a one-year statute of limitations, the State bears the burden of raising the bar of the statute of limitations as an affirmative defense." Harris v. State, 102 S.W.3d 587, 593 (Tenn. 2003) (citing Sands v. State, 903 S.W.2d 297, 299 (Tenn. 1995)). Because there is nothing in the record to indicate that the State raised the statute of limitations in the trial court, the affirmative defense has therefore been waived.

State, 519 S.W.2d 398, 400 (Tenn. Crim. App. 1974). To establish that he is entitled to a new trial, the Petitioner must show: (a) the grounds and the nature of the newly discovered evidence, (b) why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial, (c) that the Petitioner was without fault in failing to present the newly discovered evidence at the appropriate time, and (d) the relief sought. State v. Hart, 911 S.W.2d 371, 374-75 (Tenn. Crim. App. 1995).

First, this issue not only could have been litigated previously but it in fact was litigated previously in the post-conviction proceeding. As noted by the trial court at the coram nobis hearing, "[N]ot interviewing a witness can, in fact, bring about a post conviction, if it's ineffective assistance of counsel. But the Court of Criminal Appeals has already held that it's not ineffective assistance of counsel." It is undisputed that DeMoss' identity was known to both parties at the time of trial. The Petitioner's argument that trial counsel was ineffective for failing to interview this witness has been previously addressed, and this Court affirmed the post-conviction court's finding that the Petitioner's allegations of ineffectiveness had no merit. See Taylor, 2001 WL 935333, at *4 -5.

The coram nobis proceeding "is confined to errors outside the record and to matters which were not and could not have been litigated at trial, the motion for new trial, appeal, or upon post-conviction petition." Kenneth C. Stomm v. State, No. 03C01-9110-CR-00342, 1992 WL 97081, at *1 (Tenn. Crim. App., Knoxville, May 12, 1992); see also Arthur L. Armstrong v. State, No. M2005-01325-CCA-R3-CD, 2006 WL 1626726, at *9 (Tenn. Crim. App., Nashville, June 8, 2006); State v. James D. "Sonny" Yarbrough, No. 01C01-9001-CC-00012, 1990 WL 109107, at *2 (Tenn. Crim. App., Nashville, Aug. 3, 1990) (noting that the remedy of error coram nobis is also not available on matters that were or could have been litigated in a post-conviction proceeding). The Petitioner did raise this issue in his post-conviction petition, and the "proper time" to present this witness was at the post-conviction hearing.

The record does not support the post-conviction court's finding that the Petitioner was "without fault" in failing to present this witness at the proper time. As noted by this Court in the post-conviction appeal, the Petitioner did not call DeMoss at the "post-conviction hearing and offered no testimony concerning any attempts to do so." Taylor, 2001 WL 935333, at *5. As to any argument that post-conviction counsel was ineffective for failing to present DeMoss at the post-conviction hearing, it is well-settled in Tennessee that there is no constitutional or statutory right to the effective assistance of counsel in a post-conviction proceeding. See House v. State, 911 S.W.2d 705, 712 (Tenn. 1995).

Second, assuming arguendo that the Petitioner's allegations of newly discovered evidence are appropriately addressed in a petition for writ of error coram nobis, the trial court determined that DeMoss was not credible.

> As a general rule, subsequently or newly discovered evidence which is simply cumulative to other evidence in the record, see Scruggs v. State, 404 S.W.2d 485, 486 (1966), or serves no other purpose than to contradict or impeach the evidence

> adduced during the course of the trial, see Hawkins v. State, 417 S.W.2d 774, 778 (1967), will not justify the granting of a petition for the writ of error coram nobis when the evidence, if introduced, would not have resulted in a different judgment.
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> In exercising its discretion, the trial court must determine the credibility of the witnesses who testify in support of the accused's error coram nobis application. If the trial court does not believe that the witnesses presented by the accused are credible, the court should deny the application. Conversely, if the witnesses are credible, and the evidence presented would result in a different judgment, the trial court should grant the relief sought.

Hart, 911 S.W.2d at 375 (citations omitted). Here, the trial court determined "that the veracity of Mr. DeMoss is questionable at best and as a result, it would therefore be imprudent to deem his testimony reliable." We find no reason to dispute the trial court's conclusion that the witness was not credible. See State v. Johnie Jefferson and Larry Johnson, Nos. W1999-00747-CCA-R3-CD, W2000-01970-CCA-R3-CO, 2001 WL 1218287, at *15 (Tenn. Crim. App., Jackson, Oct. 12, 2001). During the interview just following the shooting, DeMoss told police that he could not identify the gunman. On the audiotape, DeMoss stated that "the other guy—I didn't see who he was. He just started shooting. Rex and Brian said that they seen [sic] him." It was not until DeMoss met the Petitioner in prison, over seven years after the murder, that he was able to provide details about the shooter.

We further concur with the finding of the trial court that the Petitioner has not shown that the new assertions of DeMoss might have resulted in a different judgment. Given the determination that DeMoss' testimony is not credible, this is true regardless of the standard applied in this case. See generally State v. Workman, 111 S.W.3d 10, 18 (Tenn. Crim. App. 2002) (holding that the "'reasonable probability' standard is the proper interpretation of the 'may have resulted in a different judgment' language used in Tennessee Code Annotated section 40-26-105"); State v. Roberto Vasques, No. M2004-00166-CCA-R3-CD, 2005 WL 2477530, at *13 (holding that the proper standard "should be whether a reasonable basis exists for concluding that had the evidence been presented at trial, the result of the proceedings might have been different"), perm. to appeal granted, (Tenn. Feb. 27, 2006).

Finally, in his brief, the Petitioner goes to great lengths to attack the State's evidence in an attempt to show that the result of the trial might have been different if DeMoss had testified. However, the gunman's height and weight were disputed issues of fact at trial, and the alleged newly discovered testimony of DeMoss only "contradict[s] or impeach[s]" the evidence adduced at trial. See Hart, 911 S.W.2d at 375. Moreover, this Court has previously found the evidence sufficient to support the Petitioner's convictions. See Taylor, 1998 WL 849324, at *3.

## CONCLUSION

Based upon the foregoing reasoning and authorities, we conclude that the trial court did not abuse its discretion in finding that the witness was not credible in his testimony at the evidentiary hearing or in denying the Petitioner's writ of error coram nobis. The judgment of the Davidson County Criminal Court is affirmed.

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DAVID H. WELLES, JUDGE